No. 18418

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WESTINGHOUSE ELECTRIC CORPORATION, ALLIS-CHALMERS MANUFACTURING COMPANY, FEDERAL PACIFIC ELECTRIC COMPANY, I-T-E CIRCUIT BREAKER COMPANY, GENERAL ELECTRIC COMPANY,

Appellants,

vs.

PACIFIC GAS AND ELECTRIC COMPANY,

Appellee.

REPLY BRIEF FOR APPELLANTS.

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vs.

PACIFIC GAS AND ELECTRIC COMPANY,

Appellee.

REPLY BRIEF FOR APPELLANTS.

This brief is presented in reply to the matters in the Answering Brief of Appellee. We shall reply to those matters in substantially the order in which they appear in Appellee's brief.

No specific reply is needed to Appellee's "Statement of the Case", for although it is incomplete, it is accurate enough for the purpose at hand, especially if it is considered in conjunction with the statement at pages 3-6 of our opening brief.

Similarly, little need be said in response to the "Preface" to Appellee's "Argument." We disagree entirely with the reasoning and conclusions of the Courts of Appeals which Appellee summarizes, but the summary is reasonably accurate. Any implication that all courts have decided this question the same way is unwarranted. Of the nine District Courts which have decided this question in cases substantially identical to

this one, three decided that fraudulent concealment would not toll the statute,[1] and after a full consideration of the merits, one other District Court has concluded in a wholly unconnected case that fraudulent concealment will not toll the limitation of section 4B.[2]

Fraudulent Concealment in the Courts.

Point II of Appellee's argument is entitled "The Fraudulent Concealment Rule Is of Long Standing and Is Read Into Every Federal Statute of Limitations." That statement and the matters set forth following it cannot be sustained. Appellee takes the position that a whole line of Supreme Court cases, beginning with *Bailey v. Glover*[3] and ending with *Holmberg v. Armbrecht*[4] enunciated and applied a "fraudulent concealment rule." Appellee is wrong. At pages 12-18 of our opening brief, we developed the difference between "undiscovered fraud" and "fraudulent concealment". At pages 18-26, we analyzed the Supreme Court cases upon which Appellee relies and demonstrated that they have nothing to do with "fraudulent concealment", but on the contrary, each dealt with the "undiscovered fraud" rule that in a case *based on fraud* the limitation period is tolled until the plaintiff, without laches

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[1]*Brigham City Corp. v. General Electric Co.,* 210 F. Supp. 574 (D. Utah 1962), *rev'd sub nom. Public Service Co. of New Mexico v. General Electric Co.,* 315 F.2d 306 (10th Cir.), *cert. denied,* 31 U.S.L. WEEK 3407 (U.S. June 10, 1963) (No. 1041); *City of Kansas City, Mo. v. Federal Pacific Electric Co.,* 1962 Trade Cas. ¶ 70,453 (W.D. Mo.), *rev'd,* 310 F.2d 271 (8th Cir. 1962), *cert. denied,* 83 Sup. Ct. 1297 (1963); *Public Service Company of New Mexico v. General Electric Co.,* Civil No. 4924 (D.N.M. July 25, 1962), *rev'd,* 315 F.2d 306 (10th Cir.), *cert. denied,* 31 U.S.L. WEEK 3407 (U.S. June 10, 1963) (No. 1041).

[2]*Rinzler v. Westinghouse Electric Corporation,* 214 F. Supp. 49 (N.D.Ga., 1962).

[3]88 U.S. (21 Wall.) 342, 22 L. Ed. 636 (1875).

[4]327 U.S. 392, 66 Sup. Ct. 582 (1946).

or lack of diligence on its part, discovers the fraud which is the gravamen of the action. We will not repeat. We should mention, however, one shining example of the twisting and torturing of the authorities to support a nonexistent "fraudulent concealment rule" with which Appellee's brief is replete. At the bottom of page 8 the following appears:

> "The fraudulent concealment rule is grounded in an equitable principle which has been characterized by the United States Supreme Court as 'Deeply rooted in our jurisprudence . . .' and 'frequently . . . employed to bar inequitable reliance on statutes of limitations . . .', namely, the rule that 'no man may take advantage of his own wrong.'
>
> *"Glus v. Brooklyn Eastern District Terminal,* 359 U. S. 231, 232-233 (1959)."

The *Glus* case had nothing to do with concealment, fraudulent or otherwise, and it in no way supports the proposition for which it is cited.

Glus was an action for damages under the FELA for an industrial disease which plaintiff allegedly contracted while working for defendant. The action was brought after the applicable statute of limitations had, by its terms, run. Plaintiff contended that defendant was estopped to assert the bar of the statute because defendant had induced plaintiff to delay his suit by false representations as to the statutory period, and the suit was commenced well within the period represented. The trial court held the action barred and dismissed the complaint. The Court of Appeals affirmed. The Supreme Court reversed, on the ground that the allegations pleaded an estoppel sufficiently to entitle plaintiff to prove it if he could. Among other things, the Supreme Court said:

> "To decide the case we need look no further than the maxim that no man may take advantage

> of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations. . . . As Mr. Justice Miller expressed it in Insurance Co. v. Wilkinson, 13 Wall. 222, 233, 20 L. Ed. 617, 'The principle is that where one party has by his representations or his conduct *induced the other party to a transaction to give him an advantage* which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. . . .
>
> ". . . Nor has counsel made any convincing arguments which might lead us to make an exception to the *doctrine of estoppel* in this case. . . ." (359 U. S. at 232-234, 79 Sup. Ct. at 762-763.) (Italics added.) (Footnotes omitted.)

The "maxim" to which the Supreme Court referred and the doctrine of equitable estoppel may be deeply rooted in our jurisprudence. But this must not be twisted into an imprimatur of the Supreme Court upon something else which was neither mentioned nor involved in the case. *Glus* simply had nothing to do with "fraudulent concealment", and is irrelevant to present inquiries, for here there is no charge that any Appellant induced Appellee to give it an unfair advantage.

Point III of Appellee's argument is entitled "The Fraudulent Concealment Rule Has Been Consistently Applied by the Federal Courts in Private Antitrust Actions in This Circuit and Elsewhere". The inaccuracy in that statement and in the matters which follow it, lies in the words "consistently" and "applied," and in the erroneous implication that the cases involved a *federal* fraudulent concealment rule.

As to "consistently," it will be observed that Appellee did not mention *State of Oklahoma ex rel. Phillips v. American Book Co.,* 144 F. 2d 585 (10th Cir. 1944), wherein the court held that fraudulent concealment would *not* toll the applicable Oklahoma statute.

As to "applied", the three cases in this Court[5] cited by Appellee held that the California fraudulent concealment rule did *not* apply on the facts there presented.

As to a *federal* fraudulent concealment rule, only two of the cases cited purported to find one,[6] and these (a) did not really consider whether such a federal doctrine existed and (b) could not have influenced Congress, being decided after 1955. The rest of the cases have nothing to do with any purported *federal* fraudulent concealment rule.[7] All of the cases cited in this portion of Appellee's brief are abstracted with respect to the points relevant here in the Appendix hereto.

Legislative Intent.

Appellee's argument at pages 16-17 of its brief (section IV) is based on the premise that there was a federal fraudulent concealment doctrine so powerful

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[5]*Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd.*, 185 F.2d 196 (9th Cir. 1950), *cert. denied*, 340 U.S. 943, 71 Sup. Ct. 506 (1951); *Burnham Chemical Co. v. Borax Consolidated, Ltd.*, 170 F.2d 569 (9th Cir. 1948), *cert. denied*, 336 U.S. 924, 69 Sup. Ct. 655 (1949); *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F.2d 742 (9th Cir. 1936), *cert. denied*, 299 U.S. 613, 57 Sup. Ct. 315 (1937).

[6]*Moviecolor Limited v. Eastman Kodak Company*, 288 F.2d 80 (2d Cir.), *cert. denied*, 368 U.S. 821, 82 Sup. Ct. 39 (1961); *Gaetzi v. Carling Brewing Co.*, 205 F. Supp. 615 (E.D. Mich. 1962).

[7]The three Ninth Circuit cases (note 5 *supra*) recognized a California fraudulent concealment rule and implied that it might be applicable on facts not there present, but all three cases held that the statute was not tolled. Both *Foster & Kleiser* (85 F.2d at 751-752) and *Burnham* (170 F.2d at 576, 578) distinguished between fraudulent concealment and the undiscovered fraud rule, C.C.P. sec. 338, subd. 4, and *Burnham* held that *Holmberg* did not apply (170 F.2d at 571, 575-578).

that absent an express rejection in terms by Congress, it would be "read into" the new enactment. Of course, no *federal* doctrine of fraudulent concealment existed. Appellee asserts (without citation of authority) that such a rule was "in effect in a majority of states", which at least is a concession that such a rule was *not* uniformly applied by the states. And while Appellee's quotations from *Exploration* and *Glus* are accurate (p. 17), neither of those cases has any relationship to "the fraudulent concealment doctrine," and neither is indicative of what the Supreme Court would require to "eliminate application" of such a doctrine (especially since the Supreme Court has never applied one).

A. The Legislative History of Prior Bills Is Entirely Relevant.

Appellee argues at pages 18-23 of its brief that the legislative history discussed at pages 27-32 and 50-60 of Appellants' Opening Brief is irrelevant because the specific "discovery" provisions which were proposed, discussed and rejected can be distinguished from the "fraudulent concealment rule" which Appellee espouses.

Of course, the committees of Congress did not think that such legislative history was irrelevant.[8] And the Supreme Court has found the rejection of proposed provisions in prior bills of great significance in construing legislation actually enacted.[9]

Mr. Stevens' remarks concerning the *Burnham* case quoted at pages 19-20 of Appellee's brief, are not indicative of the purpose of the particular provisions in earlier bills which had been rejected or of Mr. Patman's suggestions then being made. On the con-

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[8]*E.g.*, H.R. Rep. No. 422, 84th Cong., 1st Sess. 4 nn.5, 6 (1955).

[9]*E.g., New Jersey v. New York, S. & W. R.R.*, 372 U.S. 1, 7, 83 Sup. Ct. 614, 617 (1963); *United States v. Cooper Corporation*, 312 U.S. 600, 611-612, 61 Sup. Ct. 742, 747 (1941).

trary, Mr. Stevens was merely pointing out that the "chamber of horrors" presented by Mr. Burnham with respect to the plight of the ignorant plaintiff was factually inaccurate, at least as applied to Mr. Burnham's situation.

Differences between the particular proposals which Congress specifically rejected and Appellee's "fraudulent concealment rule", if there be any, cannot obscure the clear legislative intent to reject both. We pointed out at pages 27-32 of our opening brief that Congress specifically rejected proposals which would have made the equivalent of the rule actually stated in the *Bailey* and *Holmberg* cases applicable to private antitrust cases based on conspiracy. Appellee now claims in one breath that *Bailey* and *Holmberg* provide the foundation for their purported rule, and in the next, it claims that the specific rejection by Congress of the equivalent of the *Bailey* and *Holmberg* rule is irrelevant to the determination of legislative intent as to whether Appellee's supposed rule should apply. This cannot be. If *Bailey* and *Holmberg* stated Appellee's "fraudulent concealment rule", Congress rejected it. If Appellee concedes that *Bailey* and *Holmberg* did not state its "fraudulent concealment rule", then it also must concede that there is no *federal* fraudulent concealment rule and that its arguments are unsound.

At pages 50 to 60 of our opening brief we pointed out that the problem of concealed unlawful conduct and the plight of a plaintiff supposedly subjected thereto were fully presented to the congressional committee, and the conclusion was obviously reached that a fixed, mathematically determinable period should be provided, with no modification or extension in concealment cases. Neither Appellee nor any Court of Appeals has even addressed itself to that part of the legislative history, much less advanced any reason why it should not be controlling.

B. The Patman-Celler Colloquies Do Not Indicate a Legislative Intent That Fraudulent Concealment Toll the Statute.

At pages 24 to 27 of its brief, Appellee quotes at length from certain exchanges between Congressmen Patman and Celler, apparently concluding that these constitute legislative history which "requires the finding that Congress intended that the 'fraudulent concealment' rule would be changed 'Not at all.' " (p. 29.) This is nonsense, for a variety of reasons, some of which follow.

1. Mr. Celler was not talking about "fraudulent concealment." The word "concealment" was not used by anyone. Mr. Celler talked about "conspiracy or fraud". The statement actually made, "In the case of conspiracy or fraud the statute only runs from the time of discovery", equated "conspiracy" with "fraud", had no connection with concealment, and was clearly wrong. A special rule for conspiracy cases making the statute run from discovery is precisely the rule presented by S. 1910 and H. R. 7905 and so explicitly and conclusively rejected by Congress. It is inconceivable that Congressman Celler really meant to state that the bill then before the House was to have the same effect as the earlier bill which specifically provided the special rule for conspiracy cases despite the deletion of the language.

2. Congressman Celler's statements were internally inconsistent. In the course of the same colloquy he said both "We provide that the 4-year statute shall start to run from the time of the accrual of damages, from the time the wrong was done, not from the time of discovery" and "In the case of fraud or conspiracy the statute of limitation only runs from the time of discovery." Both of those statements could not have been correct. Since the second is wholly inconsistent with

what Congressman Celler's committee had done, then the first is much more likely correct. Even Congressman Patman apparently did not believe the words of Congressman Celler, for he persisted in offering his amendment even after that statement.

3. The committee reports were inconsistent with the Celler statements, and even if Mr. Celler meant what he said, the committee action should control over the statements of an individual Congressman. (*Binns v. United States,* 194 U. S. 486, 495, 24 Sup. Ct. 816, 819 [1904]; *Duplex Printing Press Co. v. Deering,* 254 U. S. 443, 475, 41 Sup. Ct. 172, 179 [1921]; *United States v. International Union etc.,* 352 U. S. 567, 585, 77 Sup. Ct. 529, 538 [1957]; *Ex parte Collett,* 337 U. S. 55, 67, 69 Sup. Ct. 944, 950-951 [1949].)

4. The House had obviously made up its mind to pass the bill as reported from the committee before the Patman-Celler colloquies occurred, and thus such confusion as they inject should be disregarded in determining the intent of the House as a whole. The state of the House on the day the bill was passed is demonstrated by the following statement of the Speaker, which was made immediately after a vote at which only forty-six congressmen voted and immediately prior to the consideration and passage of H. R. 4954: "The Chair wishes to say . . . that there is a gentleman's agreement that there would not be a rollcall vote on a substantive matter today. . . ." (101 *Cong. Rec.* 5129 [1955].) Obviously at that time and in view of all that had transpired, H. R. 4954 was not regarded as a controversial matter and the decision to pass it as reported by the committee had been made before the bill was actually brought up on the floor. Of course, the Senate did not have the benefit of those colloquies, so they can have no bearing at all on *its* intent. On the

facts, these obscure colloquies are irrelevant to the determination of the intent of Congress.

5. The intent which we are seeking is that of Congress, and while the statements of individual members are sometimes helpful in that regard, they should not be permitted to overrule or amend the action by Congress as a whole. Directly in point is *Pennsylvania R. Co. v. International Coal Min. Co.,* 230 U. S. 184, 33 Sup. Ct. 893 (1913), where the Court disregarded statements on the floor of the Senate and looked to what Congress actually did:

> "The fact that this provision measuring the amount of recovery by rebate was omitted from the act, as finally reported to both Houses and passed, is not only significant, but so conclusive against the contention of the plaintiff that it quotes—not the report of the conference committee—but a statement, made by a member of the Senate conference committee, to support the present argument that § 8 means the same thing as the omitted clause. But while they may be looked at to explain doubtful expressions, not even formal reports—much less the language of a member of a committee—can be resorted to for the purpose of construing a statute contrary to its plain terms, or to make identical that which is radically different." (230 U. S. at 198-199, 33 Sup. Ct. at 896-897.) (Footnote omitted.)

In *F. T. C. v. Anheuser-Busch, Inc.,* 363 U. S. 536, 80 Sup. Ct. 1267 (1960), the Supreme Court, with reference to statements by the floor manager of the bill which became the statute under construction, observed:

> "[T]he primary function of statutory construction is to effectuate the intent of Congress, and

> that function cannot properly be discharged by reliance upon a statement of a single Congressman, in the face of the weighty countervailing considerations which are present in this case." (363 U. S. at 553, 80 Sup. Ct. at 1276.) (Footnote omitted.)

Statements by individual congressmen are especially suspect where made, as in this instance, by those whose views have been consistently rejected by the majority of Congress. (See *Mastro Plastics Corp. v. National Labor Rel. Bd.,* 350 U. S. 270, 288, 76 Sup. Ct. 349, 361 [1956]; Moorhead, *A Congressman Looks at the Planned Colloquy and Its Effect in the Interpretation of Statutes,* 45 A.B.A.J. 1314-1315 [1959].) And the Supreme Court has held that where Congress does not accept a proposed amendment to a bill, the resulting statute is not to be construed as containing implicitly the substance of that amendment. (See *Blau v. Lehman,* 368 U. S. 402, 82 Sup. Ct. 451 [1962]; *United States v. Oregon,* 366 U. S. 643, 648, 81 Sup. Ct. 1278, 1281 [1961].)

Appellee seeks to detract from the force of *Anheuser-Busch* on the theory that Mr. Celler's remarks were crystal clear and that there are no "countervailing considerations" opposed to his remarks (pp. 28-29.) As to the clarity of Mr. Celler's remarks, how can the two statements "We provide that the 4-year statute shall start to run . . . from the time the wrong was done, not from the time of discovery" and "In the case of fraud or conspiracy the statute . . . only runs from the time of discovery," in close juxtaposition, be characterized, if not as "ambiguous and misleading"?[10]

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[10] *F.T.C. v. Anheuser-Busch, Inc.,* 363 U.S. 536, 553 n.24, 80 Sup. Ct. 1267, 1276 n.24 (1960).

Even Appellee seems to admit that Mr. Celler did not mean what he said, for it claims at page 27 that Mr. Celler meant

> "that the statute of limitations would *continue* to run from the time of discovery under Section 4B in those cases in which the statute had commenced upon discovery *prior* to the adoption of Section 4B. This could only have reference to the fraudulent concealment rule."

Of course this tortured construction is a far cry from Appellee's claim at page 28 that "Congressman Celler's remarks were prefectly [*sic*] clear." Further, Congressman Celler could not have meant what Appellee claims he meant. At the time Mr. Celler spoke, only *state* concealment doctrines of the states whose statutes of limitations were being applied had been treated by the courts as applicable to private antitrust cases; such doctrines were not uniformly applied among the states—some states having held such doctrines to be inapplicable to toll their statutes. Surely Mr. Celler did not mean that the intended uniformity of application of this new federal limitation statute be destroyed by subjecting it to the vagaries of assorted *state* doctrines with respect to tolling for concealment, so that the statute would be tolled until discovery in one state but run from the accrual of the cause in another.

The "weighty countervailing considerations" upon which the Supreme Court relied in *Anheuser-Busch,* primarily the words of the statute and the committee reports,[11] are certainly equally present in this case; and in this case, all the rest of the legislative history is entirely inconsistent with the construction which Appellee seeks to give to Mr. Celler's words.

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[11] *Id.* at 542-545, 80 Sup. Ct. at 1271-1272.

The foregoing should suffice to demonstrate that the Patman-Celler colloquies must be ignored. Those inept and ambiguous statements cannot be permitted to detract from an otherwise abundantly clear legislative intent, that the new statute *not* be tolled on any ground not expressed therein, but be enforced according to its terms.

Aids to Construction.

A. Plain Meaning.

At pages 36 to 42 of our opening brief, we argued that the language used is the best guide to legislative intent and that, considering the 1955 amendments to the Clayton Act as a whole, the language used and the obvious care with which it was selected indicated an intent that the limitation of section 4B be applied according to its terms, relieved only by the limited tolling exception which Congress specified.

In ostensible opposition to this, Appellee attempts to cast our argument in the terms used by the *loser* in the *Bailey* case that "the statute is imperative, admitting of no exceptions", and then points out that unambiguous limitation statutes have been tolled by the courts on grounds not expressed therein (pp. 30-32). Of course, we did not make the argument which Appellee seeks to attribute to us, and Appellee does not even address itself to the argument we *did* make, much less weaken or detract from it in any way.

The statements at page 31 of Appellee's brief about statutes of limitations being *tolled* in the *Holmberg* and *Glus* cases are erroneous. *Holmberg* related to *laches* in an equitable action and "statutes of limitation are not controlling measures of equitable relief."[12] And *Glus* was applying the "doctrine of estoppel."[13]

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[12]327 U.S. at 396, 66 Sup. Ct. at 584.

[13]359 U.S. at 234, 79 Sup. Ct. at 763.

B. Limitation on the Right.

At pages 43-50 of our opening brief, we urged that when a limitation is on the right itself, the period may not be extended for any reason not expressed in the limitation; that when the limitation is expressed in the statute creating the right and refers to the right, that is highly persuasive that the limitation limits the right; and that Congress intended section 4B to limit the right created by section 4. Appellee seeks to defeat this concept, at pages 32-37 of its brief, by (1) casting the problem in terms of "substantive" and "procedural" statutes of limitations and arguing that section 4B is "procedural" (pp. 32-34), and (2) claiming that equitable principles will toll "substantive" statutes of limitations, and that "the distinction between 'substantive' and 'procedural' statutes of limitation does not afford the basis for a rigid rule against consideration of equitable factors" (p. 37).

We did not use the terms "substantive" or "procedural"—those terms are Appellee's, are not sufficiently descriptive of the concepts involved to make their use meaningful, and are subject to so many proper usages having nothing to do with these concepts that their use in this connection leads inevitably to confusion and confers surface plausibility upon spurious arguments (such as Appellee now makes) which are based not on the concepts involved but on the diverse usages of the words employed as labels. Obviously every statute of limitations (including section 4B) could properly be labeled "procedural" in the broad sense that all matters relating to the enforcement of "substantive" rights in courts of law are "procedural,"[14] but conferring that label

[14] "Procedural" is defined as "of or relating to procedure . . . *esp* : of or relating to the procedure used by courts or other bodies (as governmental agencies) in administration of substantive law. . . ." (Webster's Third New International Dictionary [1961].)

does not answer the question whether a particular statute is or is not subject to tolling. In this setting it is obvious that in the Murray-Quigley colloquy (quoted by Appellee at pages 33-34) "substantive" was used as descriptive of matters giving rise to a cause of action and "procedural" referred to matters connected with its enforcement, *i.e.*, the time for bringing suit. The descriptive word has nothing to do with the intent of Congress as to whether the statute could be tolled on grounds not expressed therein.

Nothing in Appellee's brief detracts from the propositions (fully established and supported at pages 43-50 of our opening brief) that (a) a statute which constitutes a limitation on the right itself may not be tolled and (b) the fact that the limitation is imposed by the statute creating the right and refers to the right, is highly persuasive that the limitation was intended to be a limitation on the right. None of Appellee's cases refutes or weakens that proposition, for they hold no more than that the particular limitations they were applying did not limit the rights.

Proper Enforcement of the Clayton Act Precludes Tolling Section 4B for Fraudulent Concealment.

At pages 37-39 Appellee argues that "Effective and fair enforcement of the Clayton Act . . . requires that the more successful violator not reap the benefit of his ability to conceal the cause of action." (pp. 37-38.) At pages 60-79 of our opening brief, we analyzed the 1955 amendments to the Clayton Act and the Congressional policies therein expressed (supplemented by the committee reports accompanying the bill actually passed). That analysis demonstrates that Congress was concerned with a number of conflicting policies and that its enactment was a compromise among those policies and was designed to achieve effects which Con-

gress deemed to be appropriate. The internal inconsistencies in the legislation indicate that no one policy was considered as paramount or overpowering, but Congress was attempting to devise a workable program for enforcement of the Clayton Act by suits for damages, public and private. The analysis of the matters actually presented to and considered by Congress (at pages 27-32 and 50-60 of our opening brief) shows that the plight of the ignorant plaintiff and the problem of the concealed conspiracy were fully considered. The enactment of the 1955 amendments without any provisions for tolling in such cases, especially in view of the inclusion of a tolling provision of limited application in specific cases, can only indicate that Congress concluded that the policy in favor of barring stale claims and the advantages of a certain and mathematically computable limitations period (protecting defendants and the courts against stale claims and having uniform application) outweighed such disadvantage as there might be in permitting a wrongdoer to escape the payment of *treble* damages in respect of transactions long concluded and forgotten.

> "The recent expressions of this court in Tigner v. Texas . . . warn that it is not for the courts to indulge in the business of policy making in the field of antitrust legislation. Congress has not left us at large to devise every feasible means for protecting the Government as a purchaser. It is the function of Congress to fashion means to that end, and Congress has discharged this duty from time to time according to its own wisdom. Our function ends with the endeavor to ascertain from the words used, construed in the light of rele-

vant material, what was in fact the intent of Congress." (*United States v. Cooper Corporation,* 312 U. S. 600, 606, 61 Sup. Ct. 742, 744.)[15]

Conclusion.

Appellee's argument is based almost entirely on the idea that Congress must have intended a fraudulent concealment rule to apply to sections 4B and 5(b) because it adopted those sections with knowledge of the existence of that rule and did not specifically state that it should not apply. The cases will not support the existence of such a federal rule, and with the exception of some obscure, ambiguous, and inept remarks by Congressman Celler, Appellee points to nothing in the legislative history which in any way indicates that Congress thought such a rule might apply.

On the other hand, Congress was clearly aware of the Supreme Court's policy to leave antitrust remedies strictly to the Congress and to enforce such statutes in accordance with their terms.[16] And Congress did

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[15]See also *New Jersey v. New York, S. & W. R.R.,* 372 U.S. 1, 8-9, 83 Sup. Ct. 614, 618: "The court below disregarded the plain words of the statute and what we believe is the pertinent legislative history and rested its decision on the ground that to apply § 13a(1) so restrictively would 'thwart the apparent purpose of the Congress in adopting it.' . . . To ignore this we conclude was error. . . ."

United States v. Georgia Public Service Commission, 371 U.S. 285, 293, 83 Sup. Ct. 397, 402 (1963): "Whether the federal policy is a wise one is for the Congress and the Chief Executive to determine. . . . Once they have spoken it is our function to enforce their will."

Ferguson v. Skrupa, 372 U.S. 726, 731, 83 Sup. Ct. 1028, 1032 (1963), quoting from *Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421, 423, 72 Sup. Ct. 405, 407 (1952): "We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,' . . ."

[16]Both of the committee reports to accompany H. R. 4954 specifically referred to and discussed *United States v. Cooper Corporation* (H.R. Rep. No. 422, 84th Cong., 1st Sess. 3 [1955]; S. Rep. No. 619, 84th Cong., 1st Sess. 3 [1955].)

nothing to indicate that that policy, which really was well established, should be changed. Furthermore, all of the legitimate indicia of legislative intent (*e.g.*, the words used—considered both separately and in conjunction with the balance of the enactment, the interaction of the various portions of the statute, the legislative history with respect to matters presented to and considered by Congress and its action thereon, and the legislative history in the form of the committee reports on what was to be accomplished) point inexorably to the conclusion that Congress intended sections 4B and 5(b) to be enforced in accordance with their terms and without any implied tolling exceptions, for fraudulent concealment or otherwise.

The order of the District Court must be reversed.

Respectfully submitted,

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The undersigned hereby certifies that he is specifically authorized to sign and that he does hereby sign the within and foregoing Reply Brief for Appellants on behalf of each and all of the counsel above named.

G. Richard Doty

Certificate Pursuant to Rule 18.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

G. Richard Doty

Erratum

Opening Brief for Appellants, page 76, line 20, should refer to "S. Rep. No. 619," *not "H.R. Rep. No.* 619."

APPENDIX.

Abstracts of Cases Claimed by Appellee to Have Applied a Fraudulent Concealment Rule.

American Tobacco Co. v. People's Tobacco Co., 204 Fed. 58 (5th Cir. 1913), tolled the statute until plaintiff discovered the conspiracy on which its cause of action was based, but it did not do so on a "fraudulent concealment" ground. On the contrary, it applied the *Bailey* rule relating to undiscovered fraud, equating "conspiracy" with "fraud". There was no requirement of either affirmative concealment or a duty to disclose. Said the court:

> "The contention here . . . is that the combination and conspiracy . . . was concealed by the latter companies, or, at least, that their business operations and their methods were of such character that they concealed themselves, and that such concealment would prevent the running of the statute." (*Id.* at 60.)
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> "[I]f [the jury] . . . found damages for the plaintiff, making the consideration of the question of prescription necessary, then they would have already found such conduct on the part of the defendants as would amount to a fraud on the plaintiff, and all it was then necessary for it to consider was when the plaintiff first ascertained the facts which formed the basis for the charge of fraud." (*Id.* at 63.)

American Tobacco had nothing to do with federal doctrine, for although the court was a federal court, and although the cause of action was federal and the court cited *Bailey v. Glover,* the case is clear that the court was applying Louisiana law—a Louisiana statute of limitations and a Louisiana tolling rule applicable to it. (*Id.* at 61.)

Foster & Kleiser Co. v. Special Site Sign Co., 85 F. 2d 742 (9th Cir. 1936), *cert. denied,* 299 U. S. 613, 57 Sup. Ct. 315 (1937), was an action to recover treble damages for injuries sustained by reason of a conspiracy to monopolize the outdoor advertising business. Plaintiff's

> ". . . contention is that the applicable statute of limitations is section 338, subd. 4, Cal. Code Civ. Proc., which provides that an action for relief on the ground of fraud or mistake shall not be deemed to have occurred until the discovery by the aggrieved party of the facts constituting the fraud or mistake, and not by section 338, subd. 1, supra, which was pleaded by appellant. [Plaintiff's] . . . contention is that although that statute by its terms aplies only to actions for relief from fraud or mistake, the California decisions hold it also applicable to cases where there has been fraud in the concealment of the existence of a cause of action, whether the cause of action itself be based on fraud or not. . . .
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> "The Supreme Court of California, . . . has clarified the matter. In Kimball v. Pacific Gas & Elec. Co., [citation omitted] it was held that 'the three-year period provided for in section 338, subdivision 4, of the Code of Civil Procedure, applies only where fraud is the gravamen of the original action.'
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> "It also held that, 'independent of statute, a fraudulent concealment by the defendant of the facts upon which a legal common-law action is based, under the proper circumstances, tolls the statute until discovery, . . .' . . . The evidence does not show that [defendant] fraudulently concealed its monopolistic activities, but clearly shows that [plaintiff] had knowledge of sufficient facts to put it upon notice of these activities, and of

its resultant damage." (85 F. 2d at 751-752.) Although the court in *Foster & Kleiser talked* about the fraudulent concealment rule, it hardly *applied* the rule, since it *held* that plaintiff knew too many facts, and in all events the court was not stating a federal rule, it was discussing the applicable California statute of limitations and a California tolling doctrine which might apply in circumstances not there present.[a]

Burnham Chemical Co. v. Borax Consolidated, Ltd., 170 F. 2d 569 (9th Cir. 1948), *cert. denied,* 336 U. S. 924, 69 Sup. Ct. 655 (1949), was an action to recover treble damages for injuries sustained by reason of an alleged conspiracy to monopolize the borax business. While the opinion consisted primarily of statements of the contentions of the opposing parties, it is nevertheless clear that the court rejected the idea that *Holmberg v. Armbrecht* applied to treble damage cases under the antitrust laws. The court indicated that the California fraudulent concealment rule might apply, but it did not apply on the facts there presented.

Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd., 185 F. 2d 196 (9th Cir. 1950), *cert. denied,* 340 U. S. 943, 71 Sup. Ct. 506 (1951), was closely similar to *Burnham* on its facts. The court summarily disposed of plaintiff's claim that the statute of limitations was tolled by fraudulent concealment of the conspiracy, saying that the ultimate facts were known to plaintiff. (185 F. 2d at 209.) The only case mentioned was *Burnham.* The *Suckow* case thus had nothing to do with any *federal* doctrine of fraudulent concealment At most, it rejected the application of a California tolling doctrine to a California statute of limitations on the basis of the facts there present.

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[a]Note the indication that the Louisiana rule equating "conspiracy" with "fraud" announced in *American Tobacco* would not apply in California.

In *Crummer Co. v. Du Pont,* 117 F. Supp. 870 (N.D. Fla. 1954), the trial court said that the "doctrine of fraudulent concealment applies in private civil anti-trust actions" to toll the Florida statute of limitations. (*Id.* at 872.) It also said that concealment was not enough, that some trick or contrivance to exclude suspicion and prevent inquiry was also required, that the plaintiff must show that he used due diligence to discover, and that if plaintiff had the means of discovery in his power, he will be held to have known. (*Id.* at 875-876.) Then followed the paragraph quoted at pages 12-13 of Appellee's brief in which the trial court distinguished between the rule of *Bailey v. Glover* and *American Tobacco,* which it found to be inapplicable, and "the doctrine of fraudulent concealment." That court said that fraudulent concealment would toll the applicable Florida statutes, but it held that the allegations of the complaint were insufficient to invoke the doctrine. Whose fraudulent concealment doctrine is being applied is not clear; the court did not say. The cases on which it relied did not purport to apply a *federal* doctrine, but rather an Indiana statutory rule,[b] Louisiana law,[c] Texas law,[d] and California law.[e] The Court of Appeals reversed, without citation of authori-

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[b]*Wood v. Carpenter,* 101 U.S. 135, 25 L. Ed. 807 (1879).

[c]*Arkansas Natural Gas Co. v. Sartor,* 78 F.2d 924 (5th Cir. 1935), a case which is not in point at all, except for a statement with respect to the "general jurisprudence of the country" as to the requirements of fraudulent concealment, which was merely prerequisite to the statement "We know of no decision, either of controlling authority or persuasive, holding that mere ignorance on the part of the creditor [the case here] will toll the statute." *Id.* at 929.

[d]*Phillips Petroleum Co. v. Johnson,* 155 F.2d 185 (5th Cir. 1946); *Hickok Producing & Development Co. v. Texas Co.,* 128 F.2d 183 (5th Cir. 1942).

[e]*Suckow* and *Burnham, supra.*

ty, on the ground that the allegations of fraudulent concealment were sufficient to present a jury question.[f] After the trial court had directed a verdict on the special issue whether fraudulent concealment had tolled the statute, the Court of Appeals reversed again, holding that there was sufficient evidence to go to the jury on the issue.[g] In this connection, the Court of Appeals cited only the cases involving Louisiana and Texas law which had been relied upon by the trial court.[h]

Winkler-Koch Engineering Co. v. Universal Oil Products Co., 100 F. Supp. 15 (S.D.N.Y. 1951), did not apply any doctrine of fraudulent concealment. While it cited no authorities, it was obviously attempting to apply the rule as to undiscovered fraud stated in *Bailey* and *Holmberg.*

> "[W]hen a federal cause of action involves a fraud the running of a federal statute of limitations is suspended until discovery of the fraud, despite the failure of the statute to contain such a qualifying provision. . . .
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> ". . . It would be incongruous to confine a federal right within the bare terms of a state statute of limitations unrelieved by the settled federal equitable doctrine as to fraud, when even a federal statute of limitations would be given the mitigating construction required by that doctrine.
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> ". . . [L]imitations did not begin to run until after May 29, 1941, when plaintiff learned for the first time of certain facts which led plaintiff to believe that the Root decision had been obtained by fraud." (*Id.* at 29.)

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[f]*Crummer Company v. du Pont,* 223 F.2d 238 (5th Cir. 1955).
[g]*Crummer Company v. du Pont,* 255 F.2d 425 (5th Cir. 1958).
[h]See notes c and d *supra.*

> ". . . giving effect to the federal rule of construction of statutes of limitations in cases involving fraud, plaintiff is not barred from recovery of damages. . . ." (*Id.* at 30.)

We believe that the court in *Winkler-Koch* erred in its literal acceptance of the language of *Holmberg* and in applying the undiscovered fraud rule to an antitrust conspiracy case solely because one of the overt acts pursuant to the conspiracy was a heinous fraud (as well as in other respects not directly material to the instant issue). We quote from the case not because we approve it or believe it to be correct, but solely to demonstrate that it does not announce, apply, or support the existence of a federal fraudulent concealment doctrine and that it does not treat of fraudulent concealment at all.

In *Klein v. Lionel Corporation,* 130 F. Supp. 725 (D. Del. 1955), the court disposed of a claim that a statute of limitations is tolled "where knowledge is prevented by the fraudulent conduct of the wrongdoer" with the statement that "the present plaintiff in his complaint does not allege fraud in any proper sense." (*Id.* at 728.) Even if the opinion were construed to constitute an affirmance of the existence of some "fraudulent concealment" doctrine, the court is clearly referring to a Delaware rule to toll the Delaware statute and not to any federal rule: ". . . the Supreme Court of Delaware held that mere ignorance of the facts constituting the cause of action does not postpone the operation of the Statute of Limitations." (*Ibid.*)

In *Norman Tobacco & Candy Co. v. Gillette Safety Razor Co.,* 197 F. Supp. 333 (N. D. Ala. 1960), the court held that plaintiff's contention that fraudulent

concealment of the causes of action tolled the statute of limitations was without merit, principally on the ground that the doctrine was inapplicable on the merits. The case does not constitute a statement or recognition of any federal doctrine of fraudulent concealment, for although it cites the second *Crummer* appeal, the court relies primarily upon a holding of the Court of Appeals for the Fifth Circuit (in an action for breach of contract between the same parties based on the identical facts) that the evidence would not support application of the doctrine of fraudulent concealment (*Id.* at 339), and the Court of Appeals was clearly referring to an Alabama statute of limitations applicable to an Alabama cause of action and was considering whether the statute could be tolled under Alabama law.[i]

In *Philco Corp. v. Radio Corporation of America,* 186 F. Supp. 155 (E.D. Pa. 1960), the court seemed to assume, without discussion or citation of authority, that "concealment" might toll section 4B, but it held that

> "The knowledge of such facts constituted knowledge of the cause of action now claimed to have been concealed. Such knowledge negates the existence of an element essential to the defense of concealment." (*Id.* at 164.) (Footnotes omitted.)

The court's concern was clearly with some state concealment principle, for all of the cases cited in support of the above-quoted statement (being the only cases mentioned in connection with the concealment point) dealt with state law, principally Pennsylvania, and the application of state tolling principles. *Philco* does not support even the existence of a *federal* tolling

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[i]*Norman Tobacco & Candy Co. v. Gillette Safety Razor Co.,* 264 F.2d 751, 754 n.5 (5th Cir. 1959).

doctrine based on "fraudulent concealment", much less the application of a federal doctrine to section 4B of the Clayton Act.

In *Dovberg v. Dow Chemical Co.*, 195 F. Supp. 337 (E.D. Pa. 1961), the court denied a motion for summary judgment on the ground that a material issue of fact existed as to whether the claim was barred in whole or in part by the statute of limitations provided in section 4B of the Clayton Act. Although the court cited *Moviecolor*[j] as the basis for plaintiffs' contentions, the court relied upon *Philco* as stating "The essential elements of concealment of a civil conspiracy under the anti-trust laws, where a motion for summary judgment had been made . . . ." (*Id.* at 343.) Since *Philco* apparently provided the entire basis for the opinion, *Dovberg* obviously stands for no more than *Philco*. Its result was wrong.

In *Gaetzi v. Carling Brewing Co.*, 205 F. Supp. 615 (E.D. Mich. 1962), the court said that there was a federal equitable doctrine with respect to concealment that could toll the limitation period of section 4B in proper circumstances. It held, however, that no genuine issue of fact existed with respect to circumstances which would toll the statute of limitations and granted summary judgment for defendant. (*Id.* at 623.) As our discussion above of the cases relied upon by the court demonstrates, the court cited no authority other than *Moviecolor*[k] which supported the existence of the federal doctrine it announced. In announcing the existence of such a doctrine the court was wrong. No consideration was given to the proper construction

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[j] *Moviecolor Limited v. Eastman Kodak Company*, 288 F.2d 80 (2d Cir.), *cert. denied*, 368 U. S. 821, 82 Sup. Ct. 39 (1961). *Moviecolor* is discussed in detail *infra*.

[k] *Moviecolor Limited v. Eastman Kodak Company*, note j *supra*.

of section 4B or to the intent of Congress in enacting it, and the court's assumption that a federal fraudulent concealment doctrine, even if it existed, should be applied to toll section 4B was unwarranted, ill-considered, and wrong.

In *Moviecolor Limited v. Eastman Kodak Company,* 288 F. 2d 80 (2d Cir.), *cert. denied,* 368 U. S. 821, 82 Sup. Ct. 39 (1961), the cause of action arose in 1931, and the complaint was filed in 1959. Plaintiff alleged that defendants had concealed the wrong and that the statute of limitations was tolled until plaintiff discovered the wrong. The trial court did not discuss the construction of section 4B, for it found that the action was barred by the applicable New York statute of limitations (enforced in accordance with the New York law which did not recognize concealment as a ground for tolling the statute) long prior to the enactment of section 4B, and that section 4B specifically said it would not revive any actions theretofore barred.[l] Nothing was decided, or even assumed, by the trial court with respect to the effect of concealment on section 4B.

The Court of Appeals for the Second Circuit affirmed on the ground that the allegations of the complaint were not sufficient to bring plaintiff within a rule of tolling for concealment,[m] stating: "[T]he complaint does not make out, indeed it rather negatives, concealment, . . ." (288 F. 2d at 87). Recognizing that its discussion of the concealment concept and its

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[l]*Moviecolor Limited v. Eastman Kodak Co.,* 1960 Trade Cases ¶ 69,692 (S.D.N.Y. 1960). This is precisely the way the court approached the problem in the *Norman Tobacco* case, *supra, i.e.,* if the action was barred by the state statute, section 4B was immaterial, since it could not revive the claim.

[m]*Moviecolor Limited v. Eastman Kodak Company,* 288 F.2d 80, 83 (2d Cir. 1961).

application to the New York statute of limitations in a Clayton Act case was *dictum*, the court said:

> "Although we could dispose of this appeal solely on the latter ground [that there was no concealment], we think it proper to deal also with the important question of law decided by the District Court, since the issue has been fully argued, the decisions in the Southern District are in conflict, and the problem is likely to recur." (*Id.* at 83.)

Relying primarily on *Holmberg,* the court said:

> "[T]he federal rule as to the effect of concealment on the running of a period of limitation applies to an action for treble damages under the Clayton Act even when a state statute is used to measure the period; . . ." (*Ibid.*)

The explanation for the word "even" in the above quotation is that, for reasons known only to themselves, defendants had made the following *concession*:

> "Admittedly, where a federal statute of limitations is involved the federal doctrine of fraudulent concealment is read into the statute, . . ."[n]

Moviecolor is irrelevant to any consideration of tolling section 4B.

Moviecolor does not establish even the existence of a federal doctrine of fraudulent concealment. Of course, its whole discussion was *dictum.* Beyond that, the existence of such a federal doctrine was *conceded by defendants,* and the court's only problem was whether the admitted doctrine applied to toll a state statute in contravention of the state rule. This explains why the court was at no pains to define the supposed "federal concealment rule" it was to apply or to analyze

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[n]Brief on Behalf of Defendant-Appellee Eastman Kodak Company. p. 11.

the cases to see if such a rule existed.[o] The Supreme Court cases which it cited in connection with its discussion of whether the allegations of the complaint were sufficient to invoke the concealment rule and its conclusion that plaintiff's knowledge of the facts defeated any application of such doctrine, all related solely to the undiscovered fraud doctrine—none applied a rule of fraudulent concealment. Those cases may be apposite in determining when plaintiff knows too much for the application of any doctrine of which ignorance, despite due diligence, is an element, but they do not state or support a federal doctrine of fraudulent concealment.

Upon full and proper analysis, it thus appears that *Moviecolor* is wholly inapplicable here and is not even persuasive with respect to the question now before the Court—whether section 4B can be tolled by a fraudulent concealment doctrine.

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[o]The court specifically stated that the following cases purported to apply to state statutes of limitations applying to federal rights, doctrines with respect to concealment based not on federal law but rather "consistent with the law of the state where the court sat": *American Tobacco, Burnham, Suckow, Crummer* (all of which are discussed herein, *supra*) and *Tobacco and Allied Stocks, Inc. v. Transamerica Corp.*, 143 F. Supp. 323 (D. Del. 1956), *aff'd*, 244 F.2d 902 (3d Cir. 1957), a stockholder's derivative suit based on fraud.